SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 751

CHARLES A. MILLER,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF TAXATION AND ELMER S. BARLOW, AS COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN AND BRIEF IN SUPPORT THEREOF.

A. W. SCHUTZ,
Counsel for Petitioner.

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WISCONSIN DEPARTMENT OF TAXATION AND ELMER S. BARLOW, AS COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Supreme Court of the United States:

The petition of Charles A. Miller respectfully prays for a writ of certiorari to the Supreme Court of the State of Wisconsin to review the decision of said court rendered the 13th day of October, 1942, and the decision rendered therein on rehearing on the 8th day of December, 1942, being the final decision therein.

Opinion for Review.

The opinion sought to be reviewed is Charles A. Miller, Appellant, vs. Wisconsin Department of Taxation and

Elmer S. Barlow, as Commissioner of Taxation of the State of Wisconsin, Respondents, in the record herein, pages 44-46, 49.

Statement as to Jurisdiction.

This Court has jurisdiction to review said decision under Section 237 (b) of the Judicial Code (28 U. S. C. Section 344), viz:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by an appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or *where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution,* treaties, or laws of the United States; *or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution,* or any treaty or statute of, or commission held or authority exercised under, the *United States; and the power to review under this paragraph may be exercised as well where the federal claim is sustained as where it is denied.* Nothing in this paragraph shall be construed to limit or detract from the right to a review on an appeal in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on an appeal might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph." (The pertinent provisions are emphasized by counsel for petitioner.)

This case involves the constitutionality, under the due process clause of the Fourteenth Amendment of the Federal Constitution, of a statute of the State of Wisconsin,

immediately hereinafter set forth, taxing the income of husband and wife as a unit, and the competency of the Tax Commission of the State to raise the question of its unconstitutionality as against the petitioner by a *retroactive* application of the majority opinion of this Court in *Hoeper* v. *Tax Commission of Wisconsin,* 284 U. S. 206, holding that to tax such income as a unit was an arbitrary classification forbidden by the due process clause of the aforesaid Amendment, the petitioner having waived any claim of the unconstitutionality thereof when taxed thereunder, and both the State and the Commission having enforced the statute against petitioner for a period of years prior to said decision. The correctness of the State decision acquiescing in such unconstitutionality of the statute is involved because the petitioner contended both in the trial and appellate court that the minority opinion in the *Hoeper* case, written by Justice Holmes and concurred in by Justices Brandeis and Stone, holding such statute valid, is a correct interpretation of the due process clause of the Fourteenth Amendment in which it upheld the validity of this statute as a permissible classification under the due process clause of the Fourteenth Amendment.

The cases believed to support the jurisdiction of the court are as follows:

Columbus and Greenville Railway Company, v. *W. J. Miller, State Tax Collector* (1931), 283 U. S. 96, at page 99;

Hoeper v. *Tax Commission of Wisconsin* (1931), 284 U. S. 206, at pages 218, 219, 220 and 221;

Daniels v. *Tearney* (1880), 102 U. S. 415;

Chicot County Drainage District v. *Baxter State Bank* 1940), 308 U. S. 371, at pages 374 and 375;

Shepard v. *Barron* (1904), 194 U. S. 553, at page 567.

Wight v. *Davidson* (1901), 181 U. S. 371, at page 377.

The application of these cases is discussed in the brief filed herewith under the respective questions presented for review.

State Statute Involved.

The statute of the State of Wisconsin involved is Sec. 71.09 (4) (c), reading as follows:

> "Married persons living together as husband and wife may make separate returns or join in a single joint return. The tax shall be computed on the combined taxable income. * * *"

Summary Statement of the Matter Involved.

For the calendar years 1926 to 1930, both inclusive, the petitioner and his wife filed joint income tax returns in obedience to and in conformity with the requirements of Section 71.09 (4) (c) of the Wisconsin Statutes, *supra.* Under this statute the *joint net* income of the spouses was alone taxed, the losses of one being offset against the gains of the other (R. 29); decision of Wisconsin Supreme Court herein. Thereafter and subsequent to the decision of this Court in *Hoeper* v. *Tax Commission of Wisconsin,* 284 U. S. 206, decided November 30, 1931, wherein this Court held that the compulsory taxation of husband and wife on their joint income resulted in an arbitrary classification, the Commission assessed back taxes against petitioner in the sum of $2,836.23 (R. 4, 5). The assessment arises wholly by reason of the retroactive application of the *Hoeper* case by the Commission, namely, the separation by it of petitioner's income from the income of his wife, thereby resulting in the disallowance, in the computation of his income, of the offsetting losses of his wife (R. 17).

Both petitioner and his wife acquiesced in the levies originally made by the taxing authorities based upon the joint returns, made no objection thereto and paid the taxes

thereby assessed without protest. Neither at any time questioned the constitutionality of the statute of the State with respect to the income tax provisions under which said returns were made and taxes paid (R. 20, 29). The taxing authorities of the State, until the decision of this Court in the *Hoeper* case, November 30, 1931, uniformly enforced said provisions and the State availed itself of the advantages thereof for a period of approximately twenty years commencing with the year of the enactment of the Income Tax Act in 1911, *Income Tax Cases*, 148 Wis. 456, 513, *Hoeper* v. *Wis. Tax Commission*, 202 Wis. 493, 495.

In all of the tribunals which passed upon the taxpayer's contention in this case taxpayer uniformly contended that the decision of the United States Supreme Court in the *Hoeper* case did not rule the facts in his case; that the State taxing authorities were estopped to gain any advantage as against him from the unconstitutionality of its own acts; that the petitioner waived the right to stand upon his constitutional rights in the premises; that the State Tax Commission was without standing to question the constitutionality of the State statutes upon the facts in his case and that the additional exaction demanded of him was in contravention of the due process clause of the Fourteenth Amendment to the Federal Constitution (R. 20, 7 and 30).

Questions Presented.

I.

Whether the State of Wisconsin and its taxing authorities were estopped from challenging, under the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution, as against the petitioner, the constitutionality of the above State statute requiring husband and wife to submit to taxation on the basis of their combined income, the State and its taxing authorities having

availed themselves of the advantages thereof for a period of approximately twenty years, commencing with the year of the enactment of the State Income Tax Act in 1911 and ending with the decision of this Court in *Hoeper* v. *Tax Commission of Wisconsin,* 284 U. S. 206, decided November 30, 1931.

II.

Whether the Wisconsin Tax Commission, a creature of the State, was entitled to urge the unconstitutionality of the above State statute upon the facts in this case.

III.

Whether it was within the competency of the State to disregard the petitioner's waiver of the asserted unconstitutionality of the statute in controversy under the same clauses of the Fourteenth Amendment.

IV.

Whether the constitutionality of this statute, under the same clauses of the Fourteenth Amendment, should not be upheld as valid legislation, it being still on the statute books of the State of Wisconsin, for the reasons set forth in the dissenting opinion of Justices Stone, Brandeis and Holmes in the case of *Hoeper* v. *Tax Commission of Wisconsin,* 284 U. S. 206, and the unanimous opinion of the Supreme Court of Wisconsin in *Hoeper* v. *Wisconsin Tax Commission,* 202 Wis. 493.

Manner and Method of Raising Federal Questions and Lower Rulings Thereon.

QUESTIONS I AND II.

The first question and the second question corollary thereto were raised in the trial court in the assignment of

error appearing on page 7 of the record herein, paragraph (a) thereof, reading as follows:

> "That the State may assail the constitutionality of its own exactions under the Fourteenth Amendment of the Federal Constitution prohibiting, among other things, the State from depriving any person of life, liberty or property, without due process of law, or denying to any person within its jurisdiction the equal protection of the laws, such amendment having been adopted for the protection of the individual against the encroachments of the State and not for the protection of the State against its own encroachments upon the rights of the individual."

The trial court disposed of these questions adversely to the petitioner at pages 31 and 32 of the record, as will appear from this pertinent excerpt quoted therefrom:

> "There is seemingly no question here as to whether a statute of this state is unconstitutional because it is said to infringe on the due process clause or violates other constitutional sanctions. The question appears to be whether an agency of the state may assert the fact of the previously adjudicated invalidity of an act and whether such agency is precluded from so asserting because of having previously participated in proceedings under the act. It is therefore seriously doubted whether any Federal question arises here. In any event the Federal decisions cited by appellant's counsel involve a variety of situations quite different from the one here existing."

The adverse ruling of the State Supreme Court on the same questions will appear from the brief opinion of the State Supreme Court appearing at pages 45 and 46 of the record and which is appended hereto.

Question III.

The third question was raised in the trial court in the assignment of error appearing on page 7 of the record herein, paragraph (b) thereof, reading as follows:

> "The Supreme Court of the United States upon the appeal of the individual in *Hoeper* vs. *Wisconsin Tax Commission,* supra, did not hold that the individual may not waive the unconstitutional demand made by the State whereby it required its taxpayer to file a joint return with his wife and have his income combined with that of his spouse."

The trial court disposed of this question adversely to the petitioner at pages 30 and 31 of the record, as will appear from this pertinent excerpt quoted therefrom:

> "Appellant's position when analyzed amounts to this: that the taxpayer may benefit as a result of his own voluntary relinquishment of a right. The doctrine of waiver is applied to prevent one from asserting what would otherwise be his right, and *not for the purpose of gaining a benefit* or imposing a detriment upon another. One party cannot 'waive' something to the detriment of another. * * *"

The State Supreme Court passed upon this question without adverting to it in its opinion by affirming the judgment of the trial court at page 46 of the record.

Question IV.

The fourth question was raised in the trial court in the statutory brief of the petitioner and in the appellate Supreme Court, as will appear from the Motion for Rehearing appearing at page 47 of the record, particularly the following excerpt therefrom:

> "The Court will further take notice that in the trial court, page 125 of the record and in his brief in

this court, pages 26 and 27 thereof, appellant's counsel urged his opinion that in view of the recent trend of decisions of the high federal tribunal the statute condemned by the majority in the *Hoeper* case (*Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206, 52 S. Ct. 120, 76 L. Ed. 248) would now be upheld as valid legislation on the basis of the dissenting opinion of the minority, Justices Stone, Brandeis and Holmes, and the unanimous opinion of this court in *Hoeper* v. *Wisconsin Tax Commission*, 202 Wis. 493."

The State Supreme Court ruled adversely to the petitioner on this day by a denial thereof, page 49 of the record.

Reasons Relied On for the Allowance of the Writ.

QUESTION I.

The State and its instrumentality, the Wisconsin Tax Commission, after the decision in the *Hoeper* case by this Court, was estopped upon the facts appearing in this case, as against the petitioner, from retroactively challenging the constitutionality of its own enactment and acts thereunder prior to the decision in that case in that the respondent State had itself procured the enactment of the act in controversy and enforced it to its advantage for a period of approximately twenty years, and the Supreme Court of the State had twice adjudicated its constitutionality under the Federal Amendment prior to the decision of this Court in the *Hoeper* case. It is one thing for Mr. Hoeper, not having waived the constitutionality of the Act and asserted its unconstitutionality, to challenge its validity. It is quite another thing for the State, in another case as against a taxpayer who has waived its constitutionality, to itself challenge the constitutionality of its own act after having been a party thereto and profited thereby. That the constitutional guaranties operate in favor of the

citizen and against the State and are not to be employed by the State as against the citizen has been expressly ruled by this Court to apply to questions of unconstitutional assessments under the taxing power. The decisions of this Court in support of this proposition will be found under the discussion of this question in petitioner's brief filed in support hereof.

QUESTION II.

That the State's own instrumentality, in this case the Wisconsin Tax Commission, was disqualified from challenging the constitutionality, under the Fourteenth Amendment, of the State taxing act in its application to the petitioner is ruled by the holding of this Court in *Columbus and Greenville Railway Company* v. *W. J. Miller, State Tax Collector* (1931), 283 U. S. 96, pages 99 and 100. Pertinent excerpts from this decision will be found under the discussion of this question in petitioner's brief filed in support hereof.

QUESTION III.

That the taxpayer may waive the unconstitutionality of a State tax statute has been expressly decided by this Court in well-considered decisions. For the State to disregard such waiver in cases involving constitutional rights where it is thought to be prejudicial to the State and to urge the waiver in cases where it is thought by the State to be advantageous so to do in litigation involving such subject matter is a wholly totalitarian concept and alien to our system of jurisprudence. The decisions of this Court in support of this proposition will be found under the discussion of this question in petitioner's brief filed in support hereof.

QUESTION IV.

It is respectfully submitted that the dissenting opinion of this Court in the *Hoeper* case (*Hoeper* v. *Tax Commis-*

sion of Wisconsin, 284 U. S. 206, 218) written by Justice Holmes and concurred in by Justices Brandeis and Stone, wherein it was held that husband and wife, as members of a distinct status, namely, the marital status, were subject to classification for taxation on a different basis from that of persons not sustaining that status, and that accordingly the State statute in controversy was a valid exertion of legislative power by the State, is a correct exposition of constitutional law with respect to the subject of classification for tax purposes and that this Court may, and it is hoped will, embrace the earliest opportunity to overrule the majority opinion because of the fallacy inherent both in the premise and conclusion reached therein, and because it is so patently out of harmony with the great weight and preponderance of the decisions of the Court on the subject of classification for purposes of taxation. Prior to the decision of this Court in the *Hoeper* case the State Supreme Court had twice affirmed the validity of this statute under the Fourteenth Amendment in the cases of *Income Tax Cases,* 148 Wis. 456, 513, and *Hoeper* v. *Wisconsin Tax Commission,* 202 Wis. 493.

Wherefore, your petitioner prays that a writ of certiorari may be issued by this Court for the review and reversal of said judgment, as provided by law and the rules and practice of this Court.

A. W. Schutz,
Attorney for Petitioner.

State of Wisconsin,
Milwaukee County, ss:

A. W. Schutz, being duly sworn, says that he is the attorney for above named petitioner, Charles A. Miller; that he has read the foregoing petition by him subscribed and

that the facts stated therein are true to the best of his knowledge and belief.

A. W. SCHUTZ.

Subscribed and sworn to before me this 12 day of February, 1943.

RAYMOND T. ZILLMER,

[SEAL.] *Notary Public, Milwaukee County, Wis.*

My Commission Expires 1/19/47.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

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CHARLES A. MILLER,

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vs.

WISCONSIN DEPARTMENT OF TAXATION AND ELMER S. BARLOW, AS COMMISSIONER OF TAXATION OF THE STATE OF WISCONSIN,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Supreme Court of the State of Wisconsin, filed October 13, 1942, is reported in 5 N. W. (2d) 749, but is not yet reported in the official state reports. The decision on rehearing, filed December 8, 1942, has not yet been reported.

II.

Jurisdiction.

"Statement as to Jurisdiction" appearing in the Petition fully sets forth the statute and the grounds on which the jurisdiction of this Court is invoked and, for the sake of brevity, is not repeated herein.

III.

Statement of the Case.

A concise statement of the case containing all that is material to the consideration of the question presented, with appropriate page references to the printed record, will be found in the Petition under the heading "Summary Statement of the Matter Involved," and, for the sake of brevity, is not repeated herein.

IV.

Specification of Errors.

The petitioner assigns as error the ruling of the Supreme Court of the State adverse to the petitioner on each of the four questions presented for review in the Petition under the heading "Questions Presented," that is to say: (1) The State Court erred in holding that the State and its taxing authorities were not estopped from challenging, under the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution, as against the petitioner, the constitutionality of the State statute in controversy requiring husband and wife to submit to taxation on the basis of their combined income, the State and its taxing authorities having availed themselves of the advantages thereof for a period of approximately twenty years, commencing with the year of the enactment

of the State Income Tax Act in 1911 and ending with the decision of this Court in *Hoeper* v. *Tax Commission of Wisconsin,* 284 U. S. 206, decided November 30, 1931; (2) the State Court erred in holding that the Wisconsin Tax Commission, a creature of the State, was entitled to urge the unconstitutionality, under the due process clause of the Fourteenth Amendment of the Federal Constitution, of the State statute in controversy upon the facts in this case; (3) the State Court erred in disregarding the petitioner's waiver of the asserted unconstitutionality of the statute in controversy under the same clause of the Fourteenth Amendment; (4) the State Court erred in deciding adversely to the petitioner the question whether the constitutionality of this statute, under the due process clause of the Fourteenth Amendment, should not be upheld as valid legislation, it being still on the statute books of the State of Wisconsin, for the reasons set forth in the dissenting opinion of Justices Stone, Brandeis and Holmes in the case of *Hoeper* v. *Tax Commission of Wisconsin,* 284 U. S. 206, and the unanimous opinion of the Supreme Court of Wisconsin in *Hoeper* v. *Wisconsin Tax Commission,* 202 Wis. 493.

V.

ARGUMENT.

Summary of Argument.

QUESTION I.

Estoppel of the State of Wisconsin and its taxing authorities from challenging, under the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution, as against the petitioner, the constitutionality of the state statute in controversy requir-

ing husband and wife to submit to taxation on the basis of their combined income, the State and its taxing authorities having availed themselves of the advantages thereof for a period of approximately twenty years, commencing with the year of the enactment of the State Income Tax Act in 1911 and ending with the decision of this Court in Hoeper v. Tax Commission of Wisconsin, 284 U. S. 206, decided November 30, 1931.

The state supreme court, in the case of *Amerpohl* v. *Tax Commission,* 225 Wis. 62, at page 71, cited in its opinion herein, expressly recognized the rule that the State may not be heard to complain that its own enactment is void as a violation of the due process clause of the Federal Constitution, observing at page 71 that this rule and others were well established and required no discussion, but it went on to say, p. 72:

> "* * * It seems clear to us, however, that they have no application to this situation. This section (71.09) (4) (c) of the statute is not under any *present attack* for unconstitutionality. It has been declared unconstitutional by the supreme court of the United States. Respondents (Wisconsin Tax Commission) are required to respect and carry out the mandate of that court. The question here is as to the *effect* of that determination, and must necessarily be within the power of respondents to raise if they are to enforce the law in accordance with the decision." (Parenthetical matter and italics added).

The court in that decision, it is plain, subscribed to the doctrine of the absolute retroactivity of a law after it has once been declared unconstitutional by this Court, but this doctrine, the court will observe, as will be seen from decisions of this Court hereinafter cited, has been materially qualified.

In *Daniels* v. *Tearney*, 102 U. S. 415, at p. 421, this Court expressly ruled:

> "It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, *although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit.* In such cases the principle of estoppel applies with full force and conclusive effect." (Italics added).

The facts in that case were as follows: The plaintiffs in error, Daniel and others, had executed their bond for the purpose of staying execution upon a judgment in favor of one Porter, deceased, until the operation of the Ordinance of Secession hereinafter mentioned should cease. The defendants in error, Tearney and others, were the executors of his estate, and sought to enforce the obligations of the bond. The bond was given in pursuance of and in conformity with an Ordinance of Secession enacted by the State of Virginia at the commencement of the Civil War. Daniels and his co-obligors sought to avoid liability on the bond for the reason that the Ordinances of Session and all acts supplementary thereto had theretofore been declared unconstitutional by the United States Supreme Court. This Court said at p. 418, Vol. 102, U. S.:

> "That the Ordinance of Secession was void, is a proposition we need not discuss. The affirmative has been settled by the arbitrament of arms *and the repeated adjudications of this court.*" (Italics added).

But the court held in accordance with the ruling hereinbefore quoted that the principal obligor having enjoyed the benefits which the bond was intended to secure, it was then

too late to raise the question of its validity, notwithstanding the subsequently declared unconstitutionality of the Act under and by virtue of which it was executed.

This is exactly what the State of Wisconsin is doing in the case at bar. It has availed itself for its benefit of an unconstitutional law, and it cannot in this litigation with others than Hoeper, not in Mr. Hoeper's position, aver the unconstitutionality of the statute in question, although such unconstitutionality may have been pronounced by a competent judicial tribunal, to wit, the Federal Supreme Court, in another suit, to wit, the suit of Hoeper.

That unconstitutional tax acts are not within the exceptions noted in the *Daniels* case is expressly so ruled in *Wight* v. *Davidson,* 181 U. S. 371 at page 377, where the general principle is stated as follows:

> "* * * The constitutional right against unjust (i. e. unconstitutional) taxation is given for the protection of private property, and may be waived by those affected who consent to such action to their property as would otherwise be invalid." (Parenthetical matter added).

It is also manifest that tax acts are not within such exceptions from the case of *Shepard* v. *Barron,* 194 U. S. 553, hereinafter discussed under this head of the argument.

It must be steadily kept in mind that when the *Hoeper* case (284 U. S. 206) was decided, namely, November 30, 1931, petitioner had already paid his taxes and waived his constitutional right to attack the validity of the statute in question, and in passing it may be noted that this statute which was held to be unconstitutional with respect to Hoeper still remains on the State books, namely, Sec. 71.09 (4) (c) (Stats. 1941).

In the case of *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, decided January 2, 1940, the

Chicot County Drainage District, organized under the statutes of Arkansas, in a proceeding instituted by it to effect a plan of readjustment of its indebtedness under the Federal Act of May 24, 1934, providing for "Municipal-Debt Readjustments," had succeeded in readjusting its bonded indebtedness under the provisions of that Act. The Baxter State Bank, having held some of its bonds which had been issued prior to the Act, refused to surrender its bonds in conformity with the decree of the United States District Court confirming the plan of readjustment. After the entry of that decree the United States Supreme Court declared the Act of May 24, 1934, unconstitutional in the case of *Ashton* v. *Cameron County Water Improvement District No. 1 of Texas*, 298 U. S. 513. Thereafter The Baxter State Bank brought suit in the United States District Court of Arkansas to recover on the bonds by it held. The Drainage District pleaded the prior decree of the United States District Court of Arkansas in the readjustment proceedings as *res judicata*. The Bank demurred. Upon the issue thus raised, when carried to the United States Supreme Court, the latter held that notwithstanding the declared unconstitutionality of the Act of May 24, 1934, the State Bank was bound by its provisions. The doctrine there announced by the court in an opinion by Chief Justice Hughes is as follows (308 U. S. 374):

> "The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. Norton *v.* Shelby County, 118 U. S. 425, Chicago, Indianapolis & Louisville Ry. Co. *v.* Hackett, 228 U. S. 559, 566. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. *The actual existence of a statute, prior to such determination, is an opera-*

tive fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, *and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.* Without attempting to review the different classes of cases in which the consequences of a ruling against validity have been determined in relation to the particular circumstances of past transactions, we appropriately confine our consideration to the question of res adjudicata as it now comes before us." (Italics added.)

Again at 308 U. S. p. 377, in the same case, the court observed:

> "* * * *If the contention is one as to validity, (of a State statute) the question is to be considered in the light of the standing of the party who seeks to raise the question and of its particular application.* * * *"* (Parenthetical matter and italics added)

In the case of *Shepard* v. *Barron,* 194 U. S. 553, the facts were as follows: The Supreme Court of the United States in the case of *Village of Norwood* v. *Baker,* 172 U. S. 269, held unconstitutional an ordinance of a municipality of Ohio providing for special assessments upon abutting property by the front foot without taking special benefits into account.

After this decision and prompted thereby the owners of certain land adjoining the municipality of Columbus in that State, who had prior to said decision petitioned the County Commissioners to lay out a road through their land, under which an assessment under the unconstitutional law was made against them, sought to avoid the assessment, but the court held that they were estopped to raise the question of the unconstitutionality of the assessment, notwithstanding the decision in *Norwood* v. *Baker, supra,* relied upon by them. The relevant portions of the opinion follow:

(Page 566) "Although the land owners have been greatly disappointed in the results of the improvement, and the affair has proved somewhat disastrous, yet they have obtained just such an improvement as they asked for and expected, and they are the ones to bear the disappointment and loss. * * *

(Page 567) "On principles of general law, we are satisfied that the plaintiffs are not in a position to assert the unconstitutionality of the act under which they petitioned that proceedings should be taken, and that the assessment should be made in accordance with those provisions. * * *

(Page 568) "Provisions of a constitutional nature, intended for the protection of the property owner, may be waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, and where it would be unjust to others to permit it to be set up. Certainly when action of this nature has been induced at the request, and upon the instigation of an individual, he ought not to be thereafter permitted, upon general principles of justice and equity, to claim that the action which he has himself instigated and asked for, and which has been taken upon the faith of his request, should be held invalid, and the expense thereof, which he ought to pay, transferred to a third person.

(Page 571) "'*The complainants invoked the action of the county commissioners to enhance the value of their land;* they actively promoted the improvement, knowing that its cost must be paid by a front foot assessment on their property; they recognized the justice of the assessment from time to time during the progress of the work, and afterwards by paying annual installments of the assessments for seven years, and until they were tempted by the decision of the Supreme Court in *Norwood* v. *Baker,* 172 U. S. 269, to cast their burden upon the general public; and it is now too late to complain of the method of the assessment or of the lack of the special benefits which were dissipated by the collapse of the "boom".' " (Italics added.)

If the land owners in the *Shepard* case, *supra,* were estopped from availing themselves of a decision of this Court holding the challenged provisions of the law that they assailed unconstitutional, by reason of their initiation and participation in the proceedings leading up to the void assessment; with still greater logic, may it be said that the State of Wisconsin by initiating and participating in the enforcement of the unconstitutional act in controversy is now estopped from retroactively availing itself of the decision in the *Hoeper* case, especially so in view of what this Court said in *Woodruff* v. *Trapnall,* 51 U. S. 190, page 207:

> "*We naturally look to the action of a sovereign state to be characterized by a scrupulous regard to justice and a higher morality than belong to the ordinary transactions of individuals.*" (Italics added.)

It is now well established that the doctrine of waiver and estoppel with respect to the constitutionality of statutes applies both to the State and Federal governments, the same as in other cases. It is expressly stated to be the law of the land in *12 C. J. 771,* Sec. 195:

> "*The doctrine of waiver and estoppel applies to the state and federal governments the same as in other*

cases. Thus where a state has invoked the benefits of a statute or has made a statute passed by its legislature the basis of a suit it may not question the constitutionality of such statute.'' (Italics added.)

This principle was recognized as valid law in the *Amerpohl* case wherein the State court at p. 71 (225 Wis.) cited with approval the holding in *Sweeney* v. *State*, 251 N. Y. 417, 167 N. E. 519, 520, viz:

'' 'Certain it is that the state which enacted it may not be heard to complain that the enactment is void as a violation of ''due process''.' '' (Italics added.)

QUESTION II.

The Wisconsin Tax Commission, a creature of the State, was not entitled to urge the unconstitutionality, under the due process clause of the Fourteenth Amendment of the Federal Constitution, of the State statute in controversy upon the facts in this case.

It is respectfully submitted that the case at bar is squarely ruled by the decision of this Court in the case of *Columbus and Greenville Railway Company* v. *W. J. Miller, State Tax Collector* (1931), 283 U. S. 96. The facts in that case were that the Railroad Company paid a tax at a certain rate per mile under the provisions of Chapter 259 of the laws of Mississippi of the year 1926, whereas, the collector sought to impose a tax under Chapter 282 of the Laws of 1914, prescribing a larger rate per mile. In order for the collector to be successful it was necessary for him to allege the unconstitutionality of the later law. The court in holding that he had no standing to thus challenge the constitutionality under the Fourteenth Amendment of the law of his creator notwithstanding his authority under State law to assail in the courts of the State the constitutional validity

of a State statute, expressly ruled as follows: Pages 99 and 100:

> "We are not concerned with any question of the state's policy in imposing taxes, or with the various methods employed in the levee district, apart from the application of the Fourteenth Amendment. The question as to the validity of the act of 1926 is raised only by the state tax collector in his official capacity, as one acting solely under the authority of the Legislature whose requirement he contests. The only person taxed by the statute whose rights are before the court is the petitioner, which seeks to uphold the state legislation which defines its liability and with which it has complied. The questions which the collector sought to raise under the State Constitution have not been passed upon by the state court. While, so far as state practice is concerned, the authority of a public officer to assail in the courts of the state the constitutional validity of a state statute is a local question, this fact does not alter the fundamental principle, governing the determination of the federal question by this court, that the protection of the Fourteenth Amendment against state action is only for the benefit of those who are injured through the invasions of personal or property rights or through the discriminations which the amendment forbids. The constitutional guaranty does not extend to the mere interest of an official, as such, who has not been deprived of his property without due process of law or denied the equal protection of the laws."

It will be noted that in the *Hoeper* case the Tax Commission did not challenge the constitutionality of the Act under the Fourteenth Amendment, but that said challenge was solely at the suit of a private citizen. Under the principles of law discussed in the first and second branches of the argument in which it has been shown that the suit of the petitioner is separate and distinct from the suit of Hoeper and that the decision in the *Hoeper* case has no retroactive application to this case, it is clearly made to appear that

it was only by urging the unconstitutionality of the statute in question in its application to the petitioner that the Tax Commission could possibly prevail. But as will be seen from the *Columbus and Greenville Railway Company* case, the Tax Commission had no standing to urge this contention in view of the fact that that decision was not automatically and retroactively binding on Miller.

As was said in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, at p. 377:

> "* * * *If the contention is one as to validity, (of a state statute) the question is to be considered in the light of the standing of the party who seeks to raise the question and of its particular application.* * * *" (Parenthetical matter and italics added.)

Question III.

It was not within the competency of the State to disregard the petitioner's waiver of the asserted unconstitutionality of the statute in controversy under the due process clause of the Fourteenth Amendment.

That the individual may waive his constitutional rights at this late day does not appear to require the citation of authority. That such waiver may be effected either by a written memorial or a course of conduct is also clear. When, however, we speak of the waiver of constitutional rights, we are not limited to the conception of that term as applied to transactions not involving constitutional considerations. When a citizen waives a constitutional right, it is plain that he elects not to avail himself of a right guaranteed by the organic law, very often for the reason that he considers it to be to his advantage to conform to the invalid act rather than to resist it. For example, when a defendant in a criminal case elects to waive the right of trial by jury, he undoubtedly does so, as any student of human nature must know, because he believes that an advantage will accrue to

him by submitting to a trial by the court rather than by trial to a jury. In other words, when we speak of the waiver of constitutional right it does not follow that the waiver is none the less binding on the State merely because by waiving such right the citizen obtains a benefit which he would not otherwise secure. Let us take another illustration, A does work for B under an unconstitutional statute. B elects to waive the unconstitutionality of the statute in order to collect therefor from A. He elects to waive his constitutional right to have the statute declared unconstitutional. Why? Because it is to his benefit to waive that right. The point of this argument is that when a citizen elects to waive the constitutional rights guaranteed him by the organic law he invariably does so, human nature being what it is, for the reason that such waiver actually benefits him or because he believes such waiver would be beneficial to him.

That the petitioner has not waived his constitutional rights is clearly without merit. The petitioner has expressly declared in all the various stages of this proceeding his acquiescence in and waiver of the unconstitutionality of the state statute as applied to him.

But aside from this consideration, the Court may take judicial notice of the fact that there were many prosperous years intervening between the enactment of the challenged provisions in 1911 and the Hoeper decision in 1931, and the requirement of the challenged statutes for taxing the income of husband and wife as a unit by aggregating their combined incomes was then in no sense advantageous to the petitioner. The state, undoubtedly, gained material advantage at the expense of married taxpayers during this long period by requiring them to report their income as a unit. The State, therefore, should not accordingly be allowed to blow hot and cold with respect to the validity of the enforcement of this statute so far as its retroactive application is concerned.

As was observed supra in *Woodruff* v. *Trapnall*, 51 U. S. 190, p. 207:

> "We naturally look to the action of a sovereign state to be characterized by a scrupulous regard to justice and a higher morality than belong to the ordinary transactions of individuals."

Question IV.

The constitutionality of the statute in controversy (it is still on the statute books of the State of Wisconsin) should be upheld as valid legislation for the reasons set forth in the dissenting opinion of Justices Stone, Brandeis and Holmes in the case of Hoeper v. *Tax Commission of Wisconsin, 284 U. S. 206, and the unanimous opinion of the Supreme Court of Wisconsin in Hoeper* v. *Wisconsin Tax Commission, 202 Wis. 493.*

At the risk of needless repetition, it is respectfully submitted that the dissenting opinion of this Court in the *Hoeper* case (*Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206, 218), written by Justice Holmes and concurred in by Justices Brandeis and Stone, wherein it was held that husband and wife, as members of a distinct status, namely, the marital status, were subject to classification for taxation on a different basis from that of persons not sustaining that status, and that accordingly the state statute in controversy was a valid exertion of legislative power by the state, is a correct exposition of constitutional law with respect to the subject of classification for tax purposes and that this Court may, and it is hoped will, embrace the earliest opportunity to overrule the majority opinion because of the fallacy inherent both in the premise and conclusion reached therein, and because it is so patently out of harmony with the great weight and preponderance of the decisions of the Court on the subject of classification for purposes of taxation. Prior to the decision of this Court in

the *Hoeper* case, the State Supreme Court had twice affirmed the validity of this statute under the Fourteenth Amendment in the cases of *Income Tax Cases,* 148 Wis. 456, 513, and *Hoeper* v. *Wisconsin Tax Commission,* 202 Wis. 493.

The major premise of the majority opinion in the *Hoeper* case rests upon the proposition that to tax A on B's income is an arbitrary exercise of legislative power, and that since one spouse is made to measure his income by the income of the other spouse, the conclusion followed that he was arbitrarily taxed for the income of another. But the premise, it is respectfully submitted, is an over-simplification and a generalization which is at war with the constitutional principle of classification for purposes of taxation.

A familiar illustration of the fallacy lurking in the premise is that afforded by the taxation of the earnings of a corporation. Ignoring for the purposes of argument the legal fiction by which a corporation is erected into a juridical person distinct from its stockholders and looking only to substance and disregarding form, it is a realistically incontrovertible proposition that the corporate entity is but an association of individuals, namely, the stockholders, endowed by municipal law with certain privileges and immunities. Yet to tax their collective earnings in the form of a corporate tax has never been condemned or thought arbitrary as a tax imposed upon one stockholder measured by the income of the corporation, for in the same year in which the corporation may have had net earnings the individual stockholder may have had a loss exceeding his share of the undivided earnings. But, because of the corporate fiction, his share of such undivided earnings is, nevertheless, subject to tax. Therefore, it would appear to be inaccurate to say that a tax on A measured by the earnings of B is necessarily arbitrary for the reason that it does not take into account the special relationship which may exist between A and B making the one or the other, or both, mem-

bers of a distinct class. The relationship between husband and wife is very much closer than the relationship of a stockholder to his corporation. If one may be taxed for the earnings of the other, it is not perceived why the other may not be similarly taxed. If the corporate status affords a legitimate basis for classification, the marital status, it would rationally appear, is an even more reasonable basis of classification, the family unit being grounded on the natural order and being in the nature of things a natural group distinct from all others.

This Court, as late as the case of *New York Rapid Transit Corporation* v. *City of New York* (1938), 303 U. S. 573, in an exhaustive opinion by Justice Reed, said (p. 578):

> "The power to make distinctions exists with full vigor in the field of taxation, where no 'iron rule' of equality has ever been enforced upon the states."

Question V.

A recurrence to fundamenal principles in support of the argument should not be out of order.

When this Court declares an act of the State Legislature unconstitutional, it does not repeal the act; so much is axiomatic; it merely rules in its application to the particular party challenging the act that *he*, under the specific facts obtaining with respect to *him*, is not bound by it. Only by virtue of the doctrine of stare decisis is that decision binding on another suitor when he is called upon to meet a similar exaction, but then only when the facts in his case are in all material respects the same as the facts in the other. In such other case, notwithstanding the doctrine of stare decisis, the Court may be obliged to hold that a party has been estopped to raise the question of the invalidity of the statute by procuring its enactment and enforcement or by acting thereunder and this in spite of a prior decision hold-

ing the same or precisely similar act unconstitutional, as was the case in *Daniels* v. *Tearney*, 102 U. S. 415; *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, and *Shepard* v. *Barron*, 194 U. S. 553, supra.

When, therefore, the state tax commission, relying upon the *Hoeper* case, retroactively assessed taxes against the petitioner, it challenged the constitutionality of the statutes in their application to him on the ground that the *Hoeper* decision would also be held to apply to the petitioner notwithstanding the fact that the challenge there was made by Hoeper and not the state which had enacted and enforced the Act, and notwithstanding that the petitioner unlike Hoeper had acquiesced unequivocally and beyond cavil in its application to him and had elected not to stand on his constitutional rights; in other words, the commission erroneously adopted the doctrine that, with respect to any subsequent litigation, a decision once declaring an act unconstitutional was thereafter absolutely and unqualifiedly retroactive in its application to any party who might have come within the ambit of the act regardless of the facts in his case materially differing from the facts giving rise to the decision in the first case.

It should be here observed that the legal philosophy underlying the retroactive effect of judicial decisions in the light of the evolution of modern jurisprudence is now a legal fiction. The early common law courts merely undertook *to apply* the immemorial custom of the community to the facts in a given case. It did not purport to promulgate the custom. The community affected was not deemed to rely for their knowledge of the custom on the judicial pronouncement of the tribunal but rather on such immemorial custom, which alone was assumed to be well known to the community. Under modern conditions, in a society such as ours, is it at all accurate to say that the citizens rely upon

immemorial customs well known to them? The question is rhetorical and admits but one answer—they do not. They have now come to rely upon the law as previously declared and applied by the courts and upon written codes, as their provisions are defined and applied by the courts. The doctrine of stare decisis is a recognition of this phase of evolution in the administration of the law. The theory of an unchanging immemorial custom is an historical phase in the development of the law, which, applied to modern conditions, must inevitably and unreasonably work much disorder and hardship on the members of society. This was early recognized by the courts with respect to decisions announcing rules of property. The courts realized that even though the particular rule of property was unsound, if they undertook to upset it, the retroactive fiction of judicial decision would upset many titles to such an extent that the chaos resulting would be more serious than the perpetuation of the error. The point here made is that the courts should not lend their aid to an enlargement or arbitrary enforcement of this fiction, especially where the exigencies of the case do not require its application as in the case at bar.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that the writ prayed for be granted to the end that this Court may review and ultimately reverse the decision of the Supreme Court of Wisconsin because of the errors of law hereinbefore assigned.

A. W. Schutz,
Attorney for Petitioner.

INDEX AND SYNOPSIS OF ARGUMENT

CASES CITED

LAWS

STATUTES INVOLVED

TEXTS

SUPREME COURT OF THE UNITED STATES

October Term, 1942

No. 751.

CHARLES A. MILLER,

Petitioner,

vs.

WISCONSIN DEPARTMENT OF TAXATION and ARTHUR E. WEGNER, as Commissioner of Taxation of the State of Wisconsin,

Respondents.

BRIEF OF RESPONDENTS OPPOSING CERTIORARI

JURISDICTION.

Respondents oppose the granting of a writ of certiorari for the reason that no substantial federal question is presented.

STATEMENT OF THE CASE.

Petitioner and his wife, residents of Wisconsin for each of the years 1926 to 1930, inclusive, filed joint Wisconsin income tax returns. They computed and paid their tax

for each year on the combined taxable income pursuant to the provisions of sec. 71.09 (4) (b) Wis. Stats. 1925, created by sec. 2, Ch. 446, Laws of 1925, and later renumbered sec. 71.09 (4) (c). Because of losses of the wife the combined taxable incomes were smaller than the taxable incomes of the petitioner upon a separate return basis.

On November 30, 1931 this Court in *Hoeper v. Tax Comm.*, (1931) 284 U. S. 206, 76 L. ed. 248, 52 Sup. Ct. 120, reversed the decision of the Supreme Court of Wisconsin in *Hoeper v. Tax Comm.*, (1930) 202 Wis. 493, 233 N. W. 100, and held said section of the Wisconsin Statutes unconstitutional.

Thereafter, said years being open to adjustment under the Wisconsin statutes, the Assessor of Incomes audited the said returns and determined the respective Wisconsin taxable incomes of petitioner and his wife separately. Such determination of their taxable incomes upon a separate basis resulted in net taxable incomes of petitioner that were larger than the combined net taxable incomes.

In accordance with provisions of the Wisconsin Statutes petitioner was then given notice of assessment of additional taxes on the difference between his net taxable separate incomes and the net taxable combined incomes. Upon successive reviews by the Wisconsin Tax Commission, the Circuit Court for Milwaukee County and the Supreme Court of Wisconsin such additional assessment was affirmed. It is to review the decision of the Supreme Court of Wisconsin affirming the same that petitioner here seeks a writ of certiorari.

ARGUMENT

Respondents assert that no substantial federal question is presented for the following reasons:

I. HOEPER V. TAX COMM., (1931) 284 U. S. 206, 76 L. ed. 248, 52 S. Ct. 120 ESTABLISHES THE UNCONSTITUTIONALITY OF SEC. 71.09 (4) (c) WISCONSIN STATUTES AND STANDS UNIMPEACHED.

The case of *Hoeper v. Tax Comm.*, (1931) 284 U. S. 206, 76 L. ed. 248, 52 S. Ct. 120 definitely establishes the unconstitutionality of the Wisconsin statute here involved. The sole issue in that case was the constitutionality of sec. 71.09 (4) (b) Wis. Stats., later renumbered sec. 71.09 (4) (c), providing for computation of the annual Wisconsin income tax at graduated rates upon the combined net taxable income of husband and wife.

The State of Wisconsin there contended that said statutory provisions are constitutional. This Court, however, held that such provisions are violative of the equal protection and due process provisions of the Fourteenth Amendment. Ever since, the State in the administration of its income tax has completely disregarded said statutory provisions and treated them as though they never existed.

There has been no decision since the *Hoeper* case that is at all at variance with it or that in any way detracts from the force thereof. Rather it has been cited by this Court in the following cases:

Burnet v. Leininger, (1932) 285 U. S. 136, 142, 52 S. Ct. 345, 347, 76 L. ed. 655, 670;

Heiner v. Donnan, (1932) 285 U. S. 312, 324, 326, 328, 52 S. Ct. 358, 360, 361, 362, 76 L. ed. 772, 778, 779, 790;

Porter v. Commer. Int. Rev., (1933) 288 U. S. 436, 444, 53 S. Ct. 451, 453, 77 L. ed. 880, 885;

Reinecke v. Smith, (1933) 289 U. S. 172, 178, 53 S. Ct. 570, 573, 77 L. ed. 1109, 1113;

Burnet v. Wells, (1933) 289 U. S. 670, 682, 685, 53 S. Ct. 761, 765, 766, 77 L. ed. 1439, 1446, 1447;

Helvering v. City Bank Farmers Trust Co., (1935) 296 U. S. 85, 92, 56 S. Ct. 70, 74, 80 L. ed. 62, 68;

Blair v. Commer. Int. Rev., (1937) 300 U. S. 5, 12, 57 S. Ct. 330, 333, 81 L. ed. 465, 470;

Whitney v. State Tax. Comm. New York, (1940) 309 U. S. 530, 541, 60 S. Ct. 635, 640, 84 L. ed. 909, 915.

In none of these cases is there even the slightest suggestion of a doubt as to its correctness. On the contrary each and every one of such citations is a reliance upon that case as being correct.

II. SEC. 71.09 (4) (c) WISCONSIN STATUTES HAVING BEEN DECLARED INVALID BY THIS COUT, THE STATE OF WISCONSIN IS NOT PRECLUDED FROM THEREAFTER SO TREATING IT AS APPLIED TO THE INCOMES OF PRIOR YEARS STILL OPEN TO ADJUSTMENT.

1. *Treating the statute after this Court's decision in* Hoeper v. Tax Comm. *as of no force or effect is not attacking the constitutionality thereof.*

In the cases of *Amerpohl v. Tax Comm.*, (1937) 225 Wis. 62, 272 N. W. 472 and *McIntosh v. Tax Comm.*, (1937) 225 Wis. 72, 272 N. W. 476, the Supreme Court of Wisconsin held that the action of the state and its taxing authorities, after the decision of this Court in the *Hoeper* case, in treating sec. 71.09 (4) (c) Wis. Stats. as unconstitutional and so applying it, does not constitute attacking the constitutionality of that statute, but is merely giving effect to this Court's determination of that fact, and that this is true even when applied to the taxation of income of years prior to such decision which are still open to audit and adjustment.

The case of *Columbus and Greenville Ry. Co. v. Miller*, (1930) 283 U. S. 96, 75 L. ed. 861, 51 S. Ct. 392, does not support petitioner's contention. It holds that a state or officer thereof cannot challenge the constitutionality of a statute of that state. But, the situation in which that principle is applicable is greatly different from the instant one. There the constitutionality of a state statute which

taxed at a lower rate was challenged by the state tax collector as a basis for taxing at a higher rate under a prior statute. The constitutionality of the statute had never been passed upon by any court and the court held that the rule that a state may not challenge the constitutionality of its own statutes was thus applicable and precluded the state tax collector from justifying the higher tax upon that basis.

The case of *Chicot County Drainage Dist. v. Baxter State Bank,* (1940) 308 U. S. 371, 84 L. ed. 329, 60 S. Ct. 317, and the quotation therefrom at page 25 of Petitioner's Brief, are not in point for they merely are an application of the rule of *res adjudicata.*

As is shown by the testimony (R. 16), after the decision by this Court in the *Hoeper* case many refunds were granted to taxpayers of taxes for prior years, as a result of the separation of the incomes of husband and wife, where the years were still open to audit and adjustment under the Wisconsin statutes. Some were as the result of claims for refunds filed by taxpayers and some were as the result of audits made by the state tax authorities upon their own initiative. These refunds were granted upon the proposition that having been declared unconstitutional the statute in question is the same as if it never was enacted—it is no law at all. Such action is likewise nothing more than applying and giving effect to this Court's decision in the *Hoeper* case.

2. *The basis for application of the doctrine of estoppel does not exist.*

Daniels v. Tierney, (1880) 102 U. S. 415, 26 L. ed. 187, is a clear case of estoppel because of invoking the benefits

of a statute to the detriment of another and keeping such benefits while endeavoring to escape the liabilities flowing therefrom. The facts in the instant case do not fit that case nor justify an application of the principles thereof. The State here has not availed itself of the benefits of this statute as against the petitioner and then sought to avoid the liabilities to him arising therefrom. Nor has it done so in respect to others.

The only benefit there is has been to petitioner in that he has paid a lower tax than he otherwise would have paid. True it is, that in other cases the application of the family unit or combined income basis has resulted in larger taxes for other taxpayers in which cases the state derived a benefit from the statute. But, that is no basis for an estoppel here.

Furthermore, as previously mentioned, for those years still open to adjustment under Wisconsin statutes, so taxpayers could file claims for refunds or the tax authorities audit the years and assess additional taxes thus found due, refunds were granted in those cases in which it was ascertained that application of this statute resulted in a higher tax than otherwise. As to the years closed to adjustment by the statutes, both the taxpayers and the state were barred from opening them up, which is an effect in the nature of *res adjudicata*.

As previously pointed out the decision in *Chicot County Drainage Dist. v. Baxter State Bank*, (1940) 308 U. S. 371, 60 S. Ct. 317, 84 L. ed. 329 does not rest on any principle of estoppel but upon *res adjudicata*.

Shepard v. Barron, (1903) 194 U. S. 553, 48 L. ed. 1115, cited by petitioner at page 20 is a perfect illustration of the principle that one who has availed himself of the

benefits of a law cannot challenge its constitutionality so as to relieve himself from the liabilities resulting from his voluntary act.

The very essence and basis of an estoppel is completely absent here. It is that there must have been some injury to the party in whose favor it operates. Here petitioner is not hurt by treating sec. 71.09 (4) (c) Wis. Stats. as unconstitutional. All that results is that he pays the taxes which were payable if this involved law had never been enacted. He is in no worse position than he would have been in any event.

In 12 C. J. 772, para. 197 it is said:

> "Even persons to whom the doctrine of estoppel applies * * * are [not] estopped to deny the validity of a statute which has already been declared unconstitutional in the instance of other parties."

As said by the Supreme Court of Wisconsin in *Amerpohl v. State Tax Comm.*, (1937) 225 Wis. 62, 272 N. W. 472, upon this point:— (p. 476)

> "The question here is as to the effect of that determination, and must necessarily be within the power of respondent to raise if they are to enforce the law in accordance with the decision."

In addition, it is inherent in Wisconsin income taxation that the legislature has definitely provided for the correction of taxes paid, whether they be too large or too small, within a certain prescribed time, regardless of why the error occurred. (Secs. 71.10 and 71.11 Wis. Stats. 1925; Sec. 71.115 (1) (a) Wis. Stats. 1937). The corrections here made were timely and in accordance with express provisions of the Wisconsin statutes. Secs. 71.11, 71.12 and 71.17 Wis. Stats. 1931.

III. THERE WAS NO WAIVER BY PEITIONER OF THE CONSTITUTIONALITY OF THE STATUTE IN QUESTION.

The filing of the joint returns and the payment of taxes pursuant thereto on the combined incomes of petitioner and his wife neither expressly nor by the operation thereof effected a waiver by petitioner of the constitutionality of the Wisconsin statute involved. In the first place he had nothing to waive because the validity of the statute operated in his favor, so he could not waive something that benefited him. Secondly there is absolutely nothing in the joint returns that he waived anything. They are silent upon the subject. One would examine the returns in vain to find anything to indicate whether petitioner filed the joint returns because he thought the statute was valid or because he did not but waived any claim as to its invalidity.

Factually, he did not even make any such assertions in filing objections to the assessment as prescribed by sec. 71.12 Wis. Stats. 1931. It was not until in the appeal to the Circuit Court that petitioner made any claim that the filing of the returns and payment of the taxes constituted a waiver.

That no waiver exists solely by virtue of the filing of joint returns and payment of the tax, is well demonstrated by the case of where the tax would be larger on the combined incomes than on the separate incomes. Certainly such a taxpayer would not be deemed to have waived his right to file a timely claim for refund under sec. 71.17 Wis. Stats. for the excessive amount after the decision in the *Hooper* case. That refunds and adjustments may be

made at any time the years are open to adjustment regardless of how or for what reason the incorrect amount was paid, demonstrates that the filing of returns and payment of taxes based thereon does not constitute a waiver of any rights at all but the matter of the correctness of the taxes is open so long as the years are subject to adjustment and not closed under the applicable statutes.

For the above reasons the writ of certiorari prayed for should be denied.

Respectfully submitted,

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